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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

JOHN D. LUTHER,
Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Illinois Court of Appeals erred when it removed petitioner's claim of contributory negligence under the FELA from the jury's consideration after determining that respondent had not "added new dangers" to existing work conditions, rather than permitting the jury to scrutinize respondent's conduct under an "ordinary reasonableness" standard.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The only parties to this proceeding are the petitioner Norfolk and Western Railway Company and the respondent John D. Luther.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Norfolk and Western Railway Company states that it is a subsidiary of the Norfolk Southern Company.

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No. 95-———

NORFOLK AND WESTERN RAILWAY COMPANY,
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Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norfolk and Western Railway Company respectfully requests that a writ of certiorari issue to review the judgment and decision of the Appellate Court of Illinois, Fifth Judicial District.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fifth District (App. at 1a-20a) is reported at 649 N.E.2d 1000. The order of the Illinois Supreme Court (App. at 21a) denying petitioner's petition for leave to appeal is not reported. The judgment of the Circuit Court, Third Judicial Circuit, Madison County, Illinois against petitioner entered upon a jury's verdict (App. at 22a-23a) is not reported. The order of the Circuit Court, Third Judicial

Circuit, Madison County, Illinois (App. at 24a), denying petitioner's post-trial motions, is not reported.

JURISDICTION

The decision of the Appellate Court of Illinois, Fifth Judicial Circuit, was filed on May 11, 1995. App. at 1a-20a. The Illinois Supreme Court entered its Order Denying Petition for Leave to Appeal on October 4, 1995. App. at 21a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Section 1 of the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 et seq., provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51; see also 45 U.S.C. § 52.

Section 3 of the FELA, 45 U.S.C. § 53, provides in pertinent part:

> In all actions brought [on and after April 22, 1908] against any such common carrier by railroad under or by virtue of any of the provisions of this act . . . to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

Section 4 of the FELA, 45 U.S.C. § 54, provides in pertinent part:

> In any action brought against any common carrier under or by virtue of any of the provisions of this Act . . . to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

STATEMENT OF THE CASE

1. Respondent John D. Luther, an employee of petitioner Norfolk and Western Railway Company, was a track laborer for petitioner from 1979 until 1988. On August 12, 1988, he was assigned to a crew to replace defective and damaged rails on a main line in Jennings, Missouri. Although three to five laborers are normally assigned to such a crew, Luther was the only laborer assigned to cut rail on the morning of August 12.

He and the two other members of the crew boarded a high rail truck. A high rail truck can be operated on roadways and railroad tracks, and has a boom lifting device to pick up and move rails. Before leaving for the rail line, the crew loaded the truck bed with tools necessary to remove and replace rail, including bolts, spikes, and 20 pairs of angle bars. In addition, the truck bed contained a gasoline-powered rail saw, weighing approximately 40 to 50 pounds and equipped with a cutting wheel. In most situations the rail saw can readily be handled by one man. The truck bed also contained a storage box for the saw located at the front of the truck bed near the cab.

To remove a segment of defective rail, the rail is cut into a 10-foot-long section using the rail saw. The rail is then cut into three pieces, each piece weighing approximately 110 to 132 pounds. Those pieces are then loaded

into the truck bed using the boom lifting device. On the morning of the incident giving rise to respondent's claims, the crew spent approximately 1 to 1½ hours cutting and replacing rail at each defective rail site.

While preparing to move to a new job site, respondent and another member of the crew loaded the rail saw into the truck bed. Respondent climbed onto the back of the truck bed, and the other crew member handed him the saw from the ground below. The truck bed now contained between 8 and 10 pieces of defective rail, tools, angle bars and other debris. Although no explicit safety policy requires the crew to clean up the truck bed, all three members of the crew, including respondent, testified that it is the laborers' responsibility to keep the truck bed clean and orderly. Laborers certainly do not need explicit directives in order to move items for the purpose of straightening up the contents in the truck bed. Before grabbing the saw to put it away, respondent had not cleared a path to the storage box or cleared a spot on which to lay the saw. As he held the saw, respondent searched for a suitable place to put the saw down. He did not want to place the saw on the other tools and debris because he was concerned that its blades might chip. Respondent finally observed a vacant spot at the front of the cab near the storage box; however, there was no clear path to reach it. Respondent navigated his way to within about two feet of the clearing and reached out to place the saw down. As he reached out, and started putting the saw down he felt a pain in his back and fell to his knees. He did not slip or trip in any way. Respondent was taken to the hospital where he was diagnosed with a pre-existing degenerative disk disease in his back, which apparently was aggravated by the incident with the saw.

2. Respondent filed suit in the Circuit Court of Madison County, Illinois under Section 1 of the FELA, 45 U.S.C. § 51, alleging that his back injury resulted from petitioner's negligence. The FELA creates a cause of action for injuries suffered by a railroad employee as a

result of the railroad's negligence. As it relates to the case in this Court, respondent's cause of action was premised on ordinary negligence under the FELA. In its answer, petitioner raised the affirmative defense of contributory negligence under Section 3 of the FELA, 45 U.S.C. § 53. Section 3 provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53.

At the close of all the evidence, respondent filed a motion for a directed verdict regarding the defense of contributory negligence, arguing that the evidence was insufficient to create a jury question on that issue. The motion also claimed that petitioner's evidence only proved assumption of risk, a defense barred under Section 4 of the FELA. See 45 U.S.C. § 54.

In fact, during trial, petitioner had proved that respondent was aware of, created, or contributed to the creation of the conditions which resulted in his injury. Furthermore, the evidence showed that respondent could have avoided the dangerous condition by taking a few simple and reasonable precautions before accepting the saw from his fellow crew member. The trial court, however, granted respondent's motion and denied petitioner's motion to reconsider on the issue of contributory negligence. Thus, contributory negligence was withheld from the jury's consideration.

On November 3, 1992, the jury returned a verdict and awarded respondent $1,850,000.00, reduced by 15% for respondent's failure to mitigate damages. Judgment was entered against petitioner on November 5, 1992. On July 8, 1993, the Third Judicial Circuit denied petitioner's post-trial motions.

3. On May 11, 1995, the Fifth Judicial District of the Appellate Court of Illinois affirmed, by a vote of 2-1, both the directed verdict on the issue of petitioner's contribu-

tory negligence and the jury verdict. In reviewing the directed verdict on the contributory negligence defense, the Appellate Court, quoting the Illinois Supreme Court's decision in *Uhrhan* v. *Union Pac. R.R.*, 617 N.E.2d 1182, 1187 (Ill. 1993), defined contributory negligence as "a careless act or omission on the plaintiff's part tending to add *new* dangers to conditions that the employer negligently created or permitted to exist." App. at 6a (emphasis added by the Appellate Court).

Although the court explicitly recognized that a defendant "is entitled to a contributory negligence instruction if there is any evidence to support that theory," *Gish* v. *CSX Transp. Co.*, 890 F.2d 989, 992 (7th Cir. 1989); *Uhrhan v. Union Pac. R.R.*, 617 N.E.2d 1182, 1187 (Ill. 1993), the Appellate Court held that there was no evidence that respondent's acts or omissions added additional dangers to the existing situation. App. at 8a. The court reasoned that because "there were no safety rules requiring laborers to clean the truck bed," the respondent could not have avoided the hazardous condition, and, therefore, did not add a new danger. *Id.*

The dissenting judge disagreed with the majority primarily because the court subjected the defendant and plaintiff to two different standards of care. The dissent was particularly concerned that the disparate standards provided the court with a way to "remove the issue of contributory negligence from consideration by a jury." App. at 17a-18a. The dissent also noted that the plaintiff was clearly negligent; indeed, but for the plaintiff's careless acts the accident never would have occurred. App. at 16a-17a.

The Illinois Supreme Court denied review on October 4, 1995. App. at 21a.

REASONS FOR GRANTING THE PETITION

This case is the most recent in a recurring set of decisions handed down by federal and state courts, which are sharply divided as to the proper legal standard for contributory negligence under the FELA. Specifically, the issue in this case is whether the Illinois state court erred when it removed the defendant's claim of contributory negligence from the jury's consideration after determining that the plaintiff had not "added new dangers" to existing work conditions, rather than permitting the jury to scrutinize the plaintiff's conduct for comparative negligence purposes under the traditional "reasonably prudent" person standard for negligence. See App. at 8a. The decision below singularly illustrates the fundamental issue that is at the heart of the split among the lower courts, and the concrete impact that this dispute is having on the jury's role in assessing employer liability under the FELA. This case therefore presents particularly compelling reasons for granting certiorari.

1. The federal circuit courts are hopelessly split on the precise issue which is raised in this case. In the Seventh, Eighth, Ninth, and Tenth Circuits, a contributory negligence claim under the FELA is submitted to the jury only after the court finds "a careless act or omission on the plaintiff's part tending to *add new dangers* to conditions that the employer negligently created or permitted to exist." *Taylor* v. *Burlington N.R.R.*, 787 F.2d 1309, 1316 (9th Cir. 1986) (emphasis added); see also *Tersiner* v. *Union Pac. R.R.*, No. 90-3361, 1991 WL 225897 (10th Cir. Oct. 30, 1991) (unpublished decision); *Gish* v. *CSX Transp., Inc.*, 890 F.2d 989, 991 (7th Cir. 1989); *Birchem* v. *Burlington N.R.R.*, 812 F.2d 1047, 1049 (8th Cir. 1987). In the Third Circuit the contributory negligence instruction employs the "ordinary reasonableness" standard in evaluating the plaintiff's conduct. But, a contributory negligence claim is not submitted to the jury if the court determines that the employer directed the employee to perform the injury causing task. *Fas-*

hauer v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1280 (3d Cir. 1995). The Fifth and Sixth Circuits permit the jury to assess all of the plaintiff's conduct under a "reasonably prudent person" standard. *Tipton* v. *CSX Transp., Inc.*, No. 91-3333, 1992 WL 43540 (6th Cir. Mar. 9, 1992) (unpublished decision); *Kendrick* v. *Illinois Cent. Gulf R.R.*, 669 F.2d 341, 343-44 & n.1 (5th Cir. 1982); *Page* v. *St. Louis Southwestern Ry.*, 349 F.2d 820, 823-24 (5th Cir. 1965).

Because federal substantive law applies under the FELA, *St. Louis Southwestern Ry.* v. *Dickerson*, 470 U.S. 409, 411 (1985), state courts also adopt either the "additional new dangers" standard or an "ordinary reasonableness" standard. Compare *Higgins* v. *CSX Transp., Inc.*, 455 S.E.2d 129, 131 (Ga. Ct. App. 1995) (adopting "add[itional] new dangers" standard); *Norfolk & W. Ry.* v. *Hodges*, 448 S.E.2d 592, 596 (Va. 1994) (same); *Uhrhan* v. *Union Pac. R.R.*, 617 N.E.2d 1182, 1187 (Ill. 1993) (same); *Kalanick* v. *Burlington N.R.R.*, 788 P.2d 901, 904-05 (Mont. 1990) (same) with *Drury* v. *Missouri Pac. R.R.*, 905 S.W.2d 138, 149 (Mo. Ct. App. E.D. 1995) (adopting "due care" standard); *Eversole* v. *Consolidated Rail Corp.*, 551 N.E.2d 846, 851-52 (Ind. Ct. App. 1990) (adopting "ordinary prudence" standard); *Narusiewicz* v. *Burlington N.R.R.*, 391 N.W.2d 895, 897 (Minn. Ct. App. 1986) (adopting "due care" standard). Recent decisions thus reflect profound differences in opinion among both state and federal courts, resulting in an array of inconsistent decisions concerning the correct standard for making contributory negligence a jury issue. As the dissent plainly reveals in this case, the standard applied can dramatically affect liability. App. at 16a-20a.

"[T]his Court is the only body capable of resolving conflicts among the various lower courts." *Novack Inv. Co.* v. *Setser*, 454 U.S. 1064-65 (1981) (White, J., dissenting from the denial of certiorari). Indeed, "[a] prin-

cipal purpose for which [this Court uses its] certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991). Review by the Court is especially crucial in this case because "the right to trial by jury is too substantial a part of the rights accorded by [the FELA]" to permit some courts to remove the issue of contributory negligence from the jury's consideration. See *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (holding that a state procedural rule that permitted the judge rather than the jury to resolve factual questions was not permissible under the FELA); *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 509-10 (1957) (jury determinations are an integral part of the FELA's statutory scheme).

But the availability of a jury for contributory negligence in a particular FELA case now depends primarily on geography. In one jurisdiction the plaintiff will not be held accountable for his failure to perform his job safely, see, *e.g.*, *Birchem*, 812 F.2d at 1047 (knowing use of defective equipment is not sufficient to create jury question as to contributory negligence); *Rivera* v. *Farrell Lines, Inc.*, 474 F.2d 255, 258 (2d Cir. 1973) (failure to clean up or avoid spill which caused fall is not sufficient to create jury question), *cert. denied*, 414 U.S. 822 (1973); App. at 6a-9a (failure to clean truck bed in order for plaintiff safely to position himself is not sufficient to create jury question); *Pruett* v. *Norfolk & W. Ry.*, 632 N.E.2d 652, 655 (Ill. Ct. App. 1994) (forcing defective switch into place while experiencing back pain is not sufficient to create jury question); while in another court he will, see, *e.g.*, *Tipton*, 1992 WL 43540, at **4 (failure to reduce the weight of trashbags before lifting them is evidence of contributory negligence); *Fashauer*, 57 F.3d at 1280-81 (jury may assess the manner in which plaintiff walked on wet surface and whether or not plaintiff "act[ed] with due care"); *Higgins* v. *CSX Transp., Inc.*, 455 S.E.2d 129, 131 (Ga. Ct. App. 1995)

(plaintiff's failure to position himself safely *while cutting* down tree is evidence of contributory negligence); *Monroe* v. *Southern Ry.*, 436 S.E.2d 568, 570 (Ga. Ct. App. 1993) (failure to wear "ice creepers" on ice is evidence of contributory negligence). Accordingly, the Court should resolve the conflict among the lower courts and decide the proper standard for contributory negligence.

2. The split among the federal appellate courts, and the resulting disarray throughout the lower courts, stems from some of those courts' improper and inconsistent attempts to reconcile the doctrines of assumption of the risk and contributory negligence within the FELA's statutory framework. Thus, guidance as to the proper interplay between these two doctrines would unify the decisional law in this area, and restore faithful judicial compliance to the FELA's comparative negligence scheme.

In 1908, Congress enacted the FELA to provide a remedy for railroad employees injured as a result of their employers' negligence. With the enactment of the FELA, Congress codified the notion of pure comparative negligence in order to ameliorate the harsh consequences and perceived unfairness of the compete bar to recovery associated with traditional contributory negligence. Mary J. Davis, *Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability*, 39 Vill. L. Rev. 281 (1994). The courts, however, continued to apply the doctrine of assumption of risk to bar recovery. See, *e.g.*, *Seaboard Air Line Ry.* v. *Horton*, 233 U.S. 492 (1914). Because of the difficulty in distinguishing assumption of risk from contributory negligence, and the perceived inequities of a complete bar to recovery, in 1939 Congress amended the FELA to abolish assumption of risk as a basis for denying all recovery to a railroad employee. *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 58 (1943). Although this Court instructed lower courts to treat the FELA claims "as though no doctrine of assumption of risk had ever existed," *id.* at 64, some courts continue improperly to inject that con-

cept into their comparative negligence analyses in a variety of ways.

Upon receiving a defendant's claim of contributory negligence, the Seventh, Eighth, Ninth, and Tenth Circuits initially classify the plaintiff's conduct as either "assumption of risk" or "contributory negligence" depending on whether the "careless act or omission on the plaintiff's part tend[ed] to *add new dangers* to conditions that the employer negligently created or permitted to exist." *Taylor*, 787 F.2d at 1316; see also *Tersiner*, 1991 WL 225897, at **2; *Gish*, 890 F.2d at 991; *Birchem*, 812 F.2d at 1049. If the court decides that a plaintiff has not added new dangers, then the jury is not to be instructed as to the contributory negligence claim. Instead, those courts hold that the defendant is improperly raising an assumption of risk claim. Thus, the railroad is held 100% accountable for the injury. Within this framework, a court completely disposes of a defendant's contributory negligence claim in direct contravention of this Court's instruction that "[n]o case is to be withheld from a jury on any theory of assumption of risk." *Tiller*, 318 U.S. at 67.

The Third Circuit generally submits the issue of contributory negligence to the jury under a "reasonably prudent person" standard. But the Third Circuit's approach still considers the doctrine of assumption of risk. In the Third Circuit, a contributory negligence claim will not go to the jury if the claim is based on the allegation that the plaintiff accepted dangerous employment or performed in a manner that the employer directed, "regardless of whether the plaintiff acted reasonably or unreasonably" by accepting or performing the job. *Fashauer*, 57 F.3d at 1280. All other conduct is submitted to the jury under a traditional reasonableness standard. *Id.* In this case petitioner did not direct respondent's actions and therefore the issue would have been submitted to the jury if the case had arisen in Pennsylvania, New Jersey, or Delaware.

The Fifth and Sixth Circuits apply a straightforward reasonableness standard to every aspect of the plaintiff's conduct, including the choice of whether and how to perform a hazardous task. *Tipton*, 1992 WL 43540, at **2-**4; *Page* v. *St. Louis Southwestern Ry.*, 349 F.2d 820, 823-24 (5th Cir. 1965). For example, an employee who fails to avail himself of the safest alternative while performing a dangerous task may be accountable for contributory negligence if the jury finds that choice was unreasonable. See, *e.g.*, *Tipton*, 1992 WL 43540, at **4; *Eversole* v. *Consolidated Rail Corp.*, 551 N.E.2d 846, 851 (Ind. Ct. App. 1990). If, on the other hand, an employee has no choice but to perform a dangerous task in a particular way, and that task does not entail extraordinary risk, the jury likely will find that the employee's decision to perform the job was reasonable. See, *e.g.*, *Groves* v. *Illinois Cent. Gulf R.R.*, 563 So. 2d 496, 498-99 (La. Ct. App. 1990). A plaintiff may still be held contributorily negligent for unreasonably assuming a risk.[1] In either event the jury is not arbitrarily prevented from considering contributory negligence and therefore can fairly allocate fault between the parties. This approach reconciles the FELA's assumption of risk preclusion with its comparative negligence.[2] See David R. Owen & J. Marks Moore, *Comparative Negligence in Maritime Personal Injury Cases*, 43 La. L. Rev. 941, 951 (1983).

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[1] Although the Ninth Circuit uses the "additional new dangers" standard, it also has suggested that a plaintiff may be contributorily negligent for assuming extraordinary risks. *Jenkins* v. *Union Pac. R.R.*, 22 F.3d 206, 211 (9th Cir. 1994); *Taylor* v. *Burlington N.R.R.*, 787 F.2d 1309, 1316 (9th Cir. 1986).

[2] This straightforward comparison of the plaintiff's and defendant's fault is not unprecedented in the comparative negligence arena. *See, e.g., Uniform Comparative Fault Act* § 1(b), 12 U.L.A., Civ. Proc. & Remedial Laws 45 (Supp. 1995) (comparative fault under the act includes "unreasonable assumption of risk"); *Harrison* v. *Taylor*, 768 P.2d 1321, 1328-29 (Idaho 1989); *Hilen* v. *Hays*, 673 S.W.2d 713, 718-20 (Ky. 1984).

In sum, the approach followed in the Fifth and Sixth Circuits is simple, coherent, and complies with this Court's instruction to treat the doctrine of assumption of risk as though it never existed. *Tiller*, 318 U.S. at 64. This Court should therefore grant certiorari and embrace the approach followed in the Fifth and Sixth Circuits.

3. By applying the "additional new dangers" test in this case, the Illinois Court of Appeals was not faithful to the FELA's plain language or purpose because the court subjected the plaintiff and the defendant to two different standards of negligence. Holding the defendant to an ordinary negligence standard, while simultaneously refusing to submit the issue of plaintiff's negligence to the jury absent a showing that the plaintiff's "careless act or omission . . . add[ed] new dangers," clearly involves use of disparate negligence standards that is unsupported by anything in the statute.

The FELA provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. The plain language of the FELA "does not distinguish between degrees of negligence." *Fashauer* v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995); *Page*, 349 F.2d at 824. Moreover, the provision, read as a whole, does not change the standard for assessing contributory negligence; it merely describes the effects that a successful contributory negligence claim has on recovery. The 1939 amendment which abolished assumption of the risk similarly does not distinguish between degrees of negligence: "[An injured] employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or em-

ployees of such carrier." 45 U.S.C. § 54. The natural reading of § 54's "whole or in part" language suggests that if there is *any* negligence on the part of an employee, including the injured employee, the injured employee shall not be deemed to have assumed the risk. Thus, the amendment "was clearly aimed at making the principles of comparative negligence the guiding rules of decision in accident cases." *Tiller*, 318 U.S. at 65.

The FELA's comparative negligence scheme was intended equitably to apportion employer-employee responsibilities. *Id.; Kernan* v. *American Dredging Co.*, 355 U.S. 426, 438 (1958); *Page*, 349 F.2d at 824. Congress intended " 'the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in light of the comparison, do justice to all concerned.' " *Tiller*, 318 U.S. at 65 (quoting Hearings on S. 1708, Subcommittee of the Senate Judiciary Committee, 76th Cong., 1st Sess. 78 (1939)). Moreover, a pure comparative negligence scheme accounts for degrees of negligence by design. Accordingly, subjecting the parties to different threshold standards undermines the pure comparative negligence scheme embodied in the FELA. *Page*, 349 F.2d at 824; *Fashauer*, 57 F.3d at 1282-83; see also *Gavagan* v. *United States*, 955 F.2d 1016, 1019 n.7 (5th Cir. 1992) (affirming jury instruction applying same standards of care under Jones Act's comparative negligence scheme); *Karvelis* v. *Constellation Lines S.A.*, 806 F.2d 49, 53 nn.1 & 2 (2d Cir. 1986) (same), *cert. denied*, 481 U.S. 1015 (1987); *Brown* v. *OMI Corp.*, 863 F. Supp. 169 (S.D.N.Y. 1994) (refusing to apply different standards of care under Jones Act, 46 U.S.C.A. § 688 et seq.); *Bunting* v. *Sun Co.*, 643 A.2d 1085, 1089 (Pa. Super. Ct. 1994) (same).

Finally, as the facts in this case plainly illustrate, the "additional new dangers" test diminishes the safety incentives that are at the heart of the FELA's enactment. See generally *Page*, 349 F.2d at 824 ("[I]t is difficult to

see how safety is enhanced if the standard of performance by the injured worker is lowered."); Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 San Diego L. Rev. 49 (1988) (pure comparative fault aspect of the FELA serves as an incentive to employee safety). In the case at bar, respondent was unquestionably capable of clearing a space on the truck bed in order safely to put down the rail saw. His conduct thus creates a fact question as to whether he acted reasonably under the circumstances. If his actions were not reasonable, as the dissenting judge found, then respondent's recovery (which is breathtaking in magnitude) should have been reduced by his proportionate fault. At a minimum, the issue should have been submitted to the jury with a standard negligence instruction. But based on the suspect "additional new dangers" standard, the court below removed that issue from the jury and deprived petitioner of a significant basis upon which to reduce the verdict against it.

Sixty years is long enough to allow the issue of the meaning of contributory negligence under the FELA to "percolate" in the lower courts. The time has come for the Court to determine how properly to apply the comparative negligence standard in Section 3 of the FELA in a way that is consistent with the elimination of the doctrine of assumption of risk. The decision below provides a perfect vehicle by which to resolve the decisional conflict on this issue. Accordingly, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2, 1996

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APPENDICES

APPENDIX A

[Filed May 11, 1995]

IN THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-93-0530

JOHN D. LUTHER,
Plaintiff-Appellee,
v.

NORFOLK AND WESTERN RAILWAY COMPANY,
a corporation,
Defendant-Appellant.

Appeal from the Circuit Court of Madison County
No. 90-L-1354—Honorable George J. Moran,
Judge, presiding

JUSTICE GOLDENHERSH delivered the opinion of the court:

Defendant, Norfolk and Western Railway Company, appeals from a judgment in favor of plaintiff, John Luther, in an action brought by plaintiff under the Federal Employer's Liability Act (FELA) (45 U.S.C. § 51 *et seq.* (1986)), for back injuries allegedly sustained while working as a track laborer. The circuit court of Madison County entered judgment on a jury verdict awarding plaintiff $1,572,500. Defendant contends that (1) the trial court erred in directing a verdict against defendant on

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the issue of plaintiff's contributory negligence; (2) the trial court erred in admitting evidence of inapplicable and irrelevant Occupational Safety and Health Act (OSHA) (29 U.S.C. § 651 *et seq.* (1985)) regulations; (3) the trial court erred in permitting plaintiff to present evidence of defendant's surveillance tapes of plaintiff; (4) the trial court improperly permitted plaintiff's expert to give previously undisclosed opinions; (5) the trial court erred in permitting plaintiff to file numerous amendments during trial; and (6) the verdict was excessive and a product of passion and prejudice. We affirm.

I

This action arose from an injury plaintiff sustained in the course of his employment for defendant as a track laborer in an extra gang that replaced defective rail. Plaintiff held this position from 1979 until 1988. On August 19, 1988, plaintiff was assigned to work at the Jennings, Missouri, job site. Plaintiff, William Burg, foreman, and Mike James, assistant foreman, comprised the extra gang. Usually, anywhere from three to five additional laborers are part of the gang. On this particular day, plaintiff was the only laborer. The men were assigned to replace defective track on the main line at Jennings, Missouri. The gang was shorthanded and working under track time, meaning the gang had a certain amount of time to complete work on the track so as to not interfere with the train schedule. Plaintiff testified that shortly after arriving at work, plaintiff, Burg, and James took the company truck to Luther Yard to pick up the material they needed for work that morning. The materials plaintiff picked up included bolts, spikes, and 20 pairs of angle bars. Plaintiff stacked the materials alongside the tool boxes in the truck bed. After picking up the material, the gang headed for the mainline tracks to begin replacing the defective rails. To remove defective rail, the rail is cut into a 10-foot-long section. Then, the defective rail

is cut into three pieces, which are placed in the truck bed. Each piece of rail weighs about 110 to 132 pounds. Plaintiff testified that at the time of the occurrence, there were about 8 to 10 pieces of defective rail in the back of the truck, along with other tools and materials the gang used that morning.

As the gang was about to move on to the next job site, Burg told plaintiff to put away the rail saw which had been used to cut out the defective rail. The rail saw weighs about 40 pounds. Plaintiff climbed onto the back of the truck bed, and James handed him the saw. Plaintiff grabbed the saw and turned around in the spot where he was standing and looked for a safe place to lay the saw down. Plaintiff observed a clear space near the box where the rail saw is normally stored. The storage box is located in the front of the truck bed near the cab. Plaintiff testified he could not go directly to the saw box due to the pieces of rail and other materials in the truck bed. Further, plaintiff testified that he could not place the rail saw on top of the pieces of old rail, angle bars, and debris because the blades of the rail saw could easily chip, thereby creating a safety hazard—a damaged blade could cause the saw to "explode" while in use. Moreover, to place the rail saw on top of the debris is a violation of company safety rules. Plaintiff navigated his way to the clearing, bent his knees, and reached out to place the saw in the vacant space. As he reached out, plaintiff fell to his knees, dropping the saw. Simultaneously, plaintiff felt a sharp pain in the middle of his back. Burg hopped onto the truck to assist plaintiff. Burg testified that plaintiff appeared to be in a lot of pain. Plaintiff asked to be taken to a hospital as the pain grew worse. Another worker took plaintiff to St. Elizabeth's Hospital in Granite City, where he was hospitalized for about a week. Plaintiff further testified that prior to the accident, he never experienced any back pain. Plaintiff stated that since the accident he experiences constant back pain with associated problems in his extremities.

Burg and James testified that laborers are responsible for keeping the truck bed clean. Burg stated that the foreman determines when, during the day, laborers are to clean up the truck. Burg further testified that, on the day of the occurrence, the gang had only one laborer, plaintiff, and they were working under a time constraint. Burg stated: "[Because of these conditions,] I had no intentions of having anyone clean the back of the truck because we used it as a working platform for the materials we used throughout the day." Additionally, Burg testified that defendant did not have a safety policy requiring work crews to keep the truck beds clean while working.

Plaintiff's physician, Dr. Ravi Shitut, an orthopedic surgeon, testified that plaintiff suffers from degenerative disk disease, which is caused by the normal aging process. According to Dr. Shitut, this condition was aggravated by plaintiff's accident. Dr. Shitut explained that plaintiff's condition is inoperable because it involves three disks. Surgical treatment for degenerative disk disease is, in Dr. Shitut's opinion, limited to two disks at the most. Dr. Shitut stated that plaintiff's symptoms of back pain and degenerative disk disease are permanent and that the only treatment available for plaintiff is exercise, using heat on the affected area, and taking anti-inflammation and non-steroidal analgesic-type medications. Regarding plaintiff's ability to return to his laborer's job, Dr. Shitut testified that as a result of plaintiff's injuries, he is unable to resume his work as a railroad laborer.

Defendant's company physician also examined plaintiff and determined that plaintiff, due to lower back pain, did not conform to the standard required for the position of laborer. Testifying as a medical expert for defendant, Dr. John Atkinson, a rheumatologist and arthritis specialist, also examined plaintiff. Upon his review of plaintiff's medical record and a physical examination of plaintiff, Dr. Atkinson determined that plaintiff did not have sec-

ondary degenerative arthritis but did suffer from degenerative disk disease. Further, Dr. Atkinson testified that he could not find a medical explanation for plaintiff's continuing discomfort and recommended that plaintiff undergo a work-hardening program to increase his muscle tone and strength.

Plaintiff's economic expert, Dr. Leroy Grossman, testified that in the four years between plaintiff's injury and the time of the trial, plaintiff suffered a loss of $77,704 in lost wages. Dr. Grossman opined that plaintiff, age 38 at the time of the trial, would suffer future lost earnings of $536,785 if he retired at age 63 and that this figure would rise to $589,618 if plaintiff retired at age 66.

Jack Strader, plaintiff's rehabilitation counselor and vocational expert, testified that plaintiff was learning disabled and suffered from depression and continuing pain due to his back injury. As a result of these factors, plaintiff was not presently employable. Strader opined that should plaintiff overcome these difficulties, he could probably secure employment in an unskilled minimum wage job as custodial/maintenance-type work.

Defendant offered expert testimony from an occupational therapist and a rehabilitation counselor. Douglas Cole, an occupational therapist, was called to testify regarding plaintiff's ability to perform work. After reviewing plaintiff's records, Cole opined that plaintiff could perform work at the sedentary, light- or medium-level categories with restrictions, such as no highly repetitive squatting, kneeling, or bending activities. James England, a rehabilitation counselor, also reviewed plaintiff's records and recommended that plaintiff receive tutoring or on-the-job training in order to enter into a new career. Based on plaintiff's record, England opined that the types of work plaintiff can do, with additional training, include drafting, dental lab technician, cabinet-making, locksmith, small engine repair, and taxidermy.

At the close of all the evidence, plaintiff filed a motion for directed verdict on the issue of contributory negligence, which the trial court granted. The trial court denied defendant's motion for directed verdict on the issue of the affirmative defenses of contributory negligence and failure to mitigate damages.

The jury returned a verdict in favor of plaintiff and awarded $1,572,500 in damages. The trial court denied defendant's posttrial motion for judgment notwithstanding the verdict and for a new trial. Defendant now appeals.

II

Defendant first argues that the trial court erred in directing a verdict for plaintiff on the issue of contributory negligence. Defendant contends that, at trial, sufficient evidence was adduced of plaintiff's knowledge of the allegedly dangerous condition and of plaintiff's fault in creating the unsafe condition by failing to clean the truck bed. Defendant argues that because there was evidence of plaintiff's contributory negligence, the trial court should not have directed a verdict for plaintiff but, rather, it should have submitted the issue of plaintiff's contributory negligence of the jury. We disagree.

It is well established that in a FELA case, the defendant is entitled to a contributory negligence instruction if there is any evidence to support the theory. (*Pruett v. Norfolk & Western Ry. Co.* (1994), 261 Ill. App. 3d 29, 33, 632 N.E.2d 652, 655; *Uhrhan v. Union Pacific R.R. Co.* (1993), 155 Ill. 2d 537, 547, 617 N.E.2d 1182, 1187.) Nonetheless, the burden of proving plaintiff's contributory negligence is on the defendant. (*Uhrhan*, 155 Ill. 2d at 547, 617 N.E.2d at 1187.) Our supreme court defined contributory negligence as "a careless act or omission on the plaintiff's part tending to add *new* dangers to conditions that the employer negligently created or permitted to exist." (Emphasis added.) (*Uhrhan*, 155 Ill. 2d at 548, 617 N.E.2d at 1187 (citing *Taylor v.*

Burlington Northern R.R. Co. (9th Cir. 1986), 787 F.2d 1309, 1316).) Directed verdicts should be granted only when all the evidence, viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494, 229 N.E.2d 504.

Defendant maintains that plaintiff acted negligently and that the jury could have disbelieved plaintiff's testimony and inferred that, based merely on the fact that the accident occurred, plaintiff failed to exercise due care. To support its contention, defendant relies on *Uhrhan v. Union Pacific R.R. Co.* (1993), 155 Ill. 2d 537, 617 N.E.2d 1182.

In *Uhrhan*, the plaintiff, working at night as a switchman, was injured when he tripped over a piece of wire while walking alongside the tracks. There was no light in the area where the plaintiff was working. However, the plaintiff had a lantern with him. The lanterns were used to signal other switchmen and to illuminate the area while walking through the yard. Plaintiff was aware of the possibility of debris alongside the track. Also, the railroad had a safety rule requiring workers to be on the lookout for tripping hazards. At trial, the jury found in favor of the plaintiff and awarded him $17,000. The jury further determined that the plaintiff had been 40% contributorily negligent and reduced his recovery accordingly. Judgment was entered in favor of the plaintiff in the amount of $10,200. The appellate court reversed the jury's finding of contributory negligence, finding no evidence warranting the submission of contributory negligence instructions to the jury. Our supreme court reversed the appellate court, holding that a defendant in a FELA case is entitled to have a jury instructed on contributory negligence if there is any evidence to support the theory. Further, the supreme court found that evidence of a safety

rule violation raises a question of fact as to contributory negligence. Thus, the supreme court concluded that a jury could have reasonably determined that the plaintiff's actions added additional dangers to the situation.

Defendant's reliance on *Uhrhan* is misplaced. According to *Uhrhan*, we review the record to determine if there is any evidence that plaintiff's omissions or actions added additional dangers to the situation. If plaintiff's actions or omissions increased the danger to himself, defendant is entitled to raise the issue of contributory negligence. However, defendant is not entitled to reach the jury on the issue of contributory negligence, for which defendant bears the burden of proof, on nothing more than defendant's disbelief of plaintiff's testimony. (*Dixon v. Penn Central Co.* (6th Cir. 1973), 481 F.2d 833, 837.) "Other evidence of the matter to be proved must be adduced." *Dixon*, 481 F.2d at 837.

Here, there is no evidence that plaintiff violated any company safety rules. Burg testified that at the time of plaintiff's injury there were no safety rules requiring laborers to clean up the truck bed after the completion of work at each job site. Further, the gang was operating with only one laborer and under a time constraint to get the work done quickly so as to avoid disrupting rail traffic. Additionally, while defendant used other vehicles to deliver new rail to each site, there were no corresponding arrangements for removal of defective rail and debris other than piling it onto the truck bed thereby creating the hazardous condition under which plaintiff worked. Moreover, plaintiff, exercising due care, checked for hazards and decided to lay the saw in a nearby vacant space because he could not safely reach the rail saw storage box or safely put the saw on top of old rails. Thus, his conduct did not depart from that of a reasonably prudent employee in this situation. (*Tiller v. Atlantic Coast Line R.R. Co.* (1943), 318 U.S. 54, 68, 87 L. Ed. 610, 618,

63 S. Ct. 444, 451-52.) We find no evidence of contributory negligence and conclude that the trial court properly directed verdict for plaintiff.

III

Defendant next argues that a general verdict does not preclude this court from setting aside the jury's verdict because the trial court improperly admitted irrelevant and highly prejudicial evidence of defendant's alleged violation of OSHA regulations which were inapplicable to the facts of this case. We are unpersuaded by defendant's contention.

Under section 2-1201(d) of the Civil Practice Law (735 ILCS 5/2-1201(d) (West 1992)), a general verdict can be sustained on any of several bases of liability and will not be reversed due to the impairment of one of the theories. (*Witherell v. Weimer* (1987), 118 Ill. 2d 321, 329, 515 N.E.2d 68, 72; *Moore v. Jewel Tea Co.* (1970), 46 Ill. 2d 288, 263 N.E.2d 103.) Section 2-1201(d) provides:

"§ 2-1201. Return of verdict—Separate counts—Defective or unproven counts. * * *

* * *

(d) If several grounds of recovery are pleaded in support of the same claim, whether in the same or different counts, an entire verdict rendered for that claim shall not be set aside or reversed for the reason that any ground is defective, if one or more of the grounds is sufficient to sustain the verdict; nor shall the verdict be set aside or reversed for the reason that the evidence in support of any ground is insufficient to sustain a recovery thereon, unless before the case was submitted to the jury a motion was made to withdraw that ground from the jury on account of insufficient evidence and it appears that the denial of the motion was prejudicial." 735 ILCS 5/2-1201(d) (West 1992).

Here, defendant claims that the allegations of OSHA violations were inapplicable to the facts of the case. Defendant has made no attempt to establish that the evidence was insufficient to sustain the verdict as to defendant's liability. After carefully examining the record, we conclude that there is ample evidence to support the jury's verdict. Even assuming, *arguendo,* that the evidence of alleged OSHA violations was improperly allowed, the other evidence was sufficient to sustain the other theories of negligence submitted to the jury. Furthermore, before the submission of the case to the jury, defendant could have made a motion "to withdraw that ground from the jury on account of insufficient evidence." (735 ILCS 5/2-1201(d) (West 1992). However, having failed to do so, defendant cannot now seek reversal of the verdict predicated upon the infirmity of one of the theories of liability. Accordingly, we find no basis for reversal on this ground.

IV

Defendant argues that the trial court erred in permitting plaintiff to present evidence of defendant's surveillance tapes because the evidence was totally irrelevant and highly prejudicial, thereby creating a punitive atmosphere which deprived defendant of a fair trial.

It is well established that video and photographic exhibits are admissible if the probative value of the exhibits is not outweighted by the danger of unfair prejudice. (*Drews v. Gobel Freight Lines, Inc.* (1991), 144 Ill. 2d 84, 99, 578 N.E.2d 970, 977; *Cisarik v. Palos Community Hospital* (1991), 144 Ill. 2d 339, 579 N.E.2d 873.) The admission of video and photographic exhibits into evidence is within the sound discretion of the trial court. *Carney v. Smith* (1992), 240 Ill. App. 3d 650, 656, 608 N.E.2d 379, 383.

During the trial plaintiff introduced videotapes of surveillance of plaintiff conducted by defendant. The videotapes depicted plaintiff going about his daily activities.

The tapes represent about 50 hours of surveillance activity and were intended to document physical activities inconsistent with plaintiff's asserted physical limitations resulting from his injury. However, the videotapes do not show plaintiff performing activities inconsistent with his claimed physical limitations.

Because plaintiff's abilities are a matter in controversy, the surveillance tapes were relevant and had probative value concerning the issue of the extent of plaintiff's injury (*Carney*, 240 Ill. App. 3d at 657, 608 N.E.2d at 383.) Defendant urges this court to find that the prejudicial effect of the videotapes substantially outweighs their probative value because the videotapes tend to corroborate both plaintiff's testimony and the medical testimony regarding plaintiff's limited physical capacity. However, we see no prejudice that defendant allegedly suffered by admission of the videotapes. Therefore, we find that the trial court did not err in admitting the videotapes into evidence.

V

Defendant also raises objections to the testimony of plaintiff's expert economist, Dr. Leroy Grossman. Defendant maintains that Dr. Grossman's testimony violated Supreme Court Rule 220 (134 Ill. 2d R. 220) because the opinions expressed were beyond the scope of his original report and deposition testimony regarding plaintiff's lost wages. (*Singh v. Air Illinois, Inc.* (1988), 165 Ill. App. 3d 923, 930, 520 N.E.2d 852, 856.) The figures presented in Dr. Grossman's testimony at trial and in the supplemental report were based on the earnings of plaintiff's coworker, a machine operator. Although plaintiff is a track laborer, he also has machine operator rights, which are lower on defendant's seniority roster. Because plaintiff's future wages are based on a seniority system and since the coworker's classification was comparable to plaintiff's, the coworker's earnings were used by Dr. Grossman to recalculate plaintiff's future lost wages. Defendant

contends that the recalculations essentially amended the original report because the amount of future lost wages was significantly greater. Defendant further contends that because plaintiff failed to make the supplemental report available to defendant until the eve of the trial, defendant was unable to adequately investigate the underlying basis of the new opinions. Consequently, defendant argues that it was prejudiced by this nondisclosure.

Supreme Court Rule 220(c)(3), which relates to the discovery of an expert's opinion, states:

> "Rule 220. Expert Witnesses
>
> * * *
>
> (c) Discovery.
>
> * * *
>
> (3) A party shall be required to seasonably supplement his answers to interrogatories propounded under this rule as additional information becomes known to the party or his counsel." 134 Ill. 2d R. 220(c)(3).

The Committee Comments for paragraph (c) further illuminates a party's obligation to disclose any modifications in opinions which may be expressed at trial, stating that:

> "In order to prevent an undisclosed shift in theory or belief the rule requires that a party seasonably submit a modified report or supplemental answers taking into account shifts in the expert's views." 134 Ill. 2d R. 220(c)(3), Committee Comments at 181.

Upon review of the record, we conclude that Dr. Grossman's revisions did not constitute a "shift in theory or belief." Dr. Grossman's supplemental report was merely an update of the original and used the same methodology to determine the present value of plaintiff's future lost

wages. With respect to the timeliness of plaintiff's disclosure of the supplemental figures, defendant failed to produce the requested wage roster and seniority list until shortly before the start of the trial. Defendant can hardly complain about the timeliness of plaintiff's disclosure given its delay in producing the requested documents. Additionally, the trial court permitted defendant to interview Dr. Grossman regarding the supplemental figures before he testified at trial. There was no violation of Supreme Court Rule 220.

VI

The next issue defendant asks us to address is whether the trial court erred by allowing plaintiff to amend his complaint on four separate occasions between the day before the trial and the jury instruction conference. According to defendant, each amended complaint filed by plaintiff presented a new theory of liability, thereby forcing defendant to constantly respond to new legal theories and preventing it from obtaining full disclosure of plaintiff's claim until the end of the trial. Defendant asserts that these amendments unfairly prejudiced its case and deprived defendant of a fair trial.

The decision to allow an amendment to a complaint lies within the sound discretion of the trial court, and its decision will not be disturbed absent an abuse of discretion. (*Grimming v. Alton & Southern Ry. Co.* (1990), 204 Ill. App. 3d 961, 987, 562 N.E.2d 1086, 1102.) Specifically, given the liberal policy of permitting amendments to pleadings, courts may allow, after the close of the evidence, amendments to conform pleadings to the proof, "but their materiality to the evidence already introduced must be apparent." (*Lawson v. Hill* (1979), 77 Ill. App. 3d 835, 845, 396 N.E.2d 617, 625.) The *Lawson* court went on to explain:

> "[W]hile recognizing that an amendment should not ordinarily be permitted to set up matters of which the

> pleader had full knowledge at the time of interposing the original pleading and no excuse is presented for not putting its substance in the original pleading, such an amendment will be allowed where justice is not served by denying leave to amend; doubts should be resolved in favor of allowing amendments." *Lawson,* 77 Ill. App. 3d at 845, 396 N.E.2d at 625.

In the instant case, plaintiff's original complaint alleged as negligence defendant's failure to provide plaintiff with a reasonably safe place to work. Plaintiff's initial amendments neither raised new issues nor changed the underlying facts. These amendments merely added additional allegations of negligence arising out of violations of OSHA regulations. 29 U.S.C. § 651 *et seq.* (1985).

The trial court permitted plaintiff to file his second amended complaint on the day jury selection began. The court granted defendant a 13-day continuance to permit defendant to address plaintiff's additional allegations of OSHA violations. At that time, the court stated that it would give defendant, upon written motion, more time if needed. Further, the court advised defendant that it would also consider postponing opening statements should that be necessary to ensure defendant adequate time to review the amended allegations and related law. At no time thereafter did defendant request any additional time to respond to amended allegations.

With respect to plaintiff's fourth amended complaint, the only new issue raised was whether the Locomotive Inspection Act (45 U.S.C. § 23 (1986)) was applicable to the particular truck involved here. The trial court granted defendant's motion to dismiss plaintiff's fourth amended complaint.

Despite defendant's contention to the contrary, the trial court's allowance of these amendments did not prejudice defendant or deprive him of a fair trial. Therefore, we

find no error or abuse of discretion in the trial court's ruling allowing the amendments to the complaint.

VII

Finally, defendant argues that the verdict is excessive because it is based on passion and prejudice. Defendant contends that the $1,500,000 award bears no relationship to the nature and extent of plaintiff's injury and the substantial evidence of plaintiff's contributory fault. We find no merit in this contention.

Despite defendant's strenuous arguments to the contrary, our review of the record finds nothing presented to the jury at trial or in opening statements to inflame the passions and prejudices of the jury. Most importantly, the record clearly supports the jury's verdict. The ascertainment and assessment of damages are primarily questions of fact and are peculiarly within the province of the jury to determine. (*Bridgeman v. Terminal R.R. Association* (1990), 195 Ill. App. 3d 966, 975, 552 N.E.2d 1146, 1151.) This court will not substitute its judgment for that of the jury as to the amount awarded in any given case. (*Bridgeman*, 195 Ill. App. 3d at 975, 552 N.E.2d at 1151.) Here, the amount of the award is not excessive, nor does it shock the judicial conscience. There is no basis in this record to say the size of the verdict is the result of prejudice or passion on the part of the jury.

For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed.

Affirmed.

WELCH, J., concurs.

JUSTICE LEWIS, dissenting:

> "What's in a name? that which we call a rose
> By any other name would smell as sweet."
>
> Shakespeare: *Romeo and Juliet*, act II, sc. ii, 43.

I dislike disagreeing with my colleagues, but I just can not see how plaintiff's negligence is different from plaintiff's contributory negligence. The point is, plaintiff had the burden of proving that defendant was negligent, and plaintiff did so by proving defendant's employee was negligent. Who was defendant's employee that was so negligent? Why it was none other than plaintiff. If plaintiff's negligence was so great as to be imputed to defendant, how can we say that plaintiff was not contributorily negligent? There must be two different meanings for the word "negligence," depending on whose ox is being gored.

The evidence for purposes of a motion for a directed verdict by plaintiff on the issue of contributory negligence must be construed most favorably for defendant. (*Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494, 229 N.E.2d 504.) Thus, the evidence showed that plaintiff was responsible for keeping the back or bed of the truck clean and orderly. He did not do so. Plaintiff could and should have taken some time to straighten the truck up, but he did not. Plaintiff could and should have taken the time to clear a path to where he wished to place the saw, but he did not. Plaintiff could have laid the saw down on a tool box (this matter was vigorously disputed), stepped over materials in the truck, and positioned himself better to move the saw to the floor of the truck, but he did not. Plaintiff, after receiving the saw from the assistant foreman, only then looked for a place to set the saw, instead of deciding, before he accepted the saw, where he was going to place the saw. Plaintiff reached out to place the saw in a small clear spot instead of positioning himself so that he could bend his knees and

set the saw straight down. Clearly, the jury could find that the party who caused the accident was the plaintiff. In fact, if you exclude plaintiff's acts as the cause of the accident, there is not anyone else or any other agency that we can point the finger at as the cause of plaintiff's injury.

The facts in this case are more one-sided than the facts in *Uhrhan v. Union Pacific R.R. Co.* (1993), 155 Ill. 2d 537, 617 N.E.2d 1182, because in *Uhrhan* someone other than plaintiff left the wire along the tracks, plaintiff was busy doing his job by signaling and keeping his eye on the other switchmen, and at one time the railroad had recognized the danger and hired people to walk along the tracks to clean up the debris. In spite of all this, the supreme court said that the jury should have been allowed to decide if plaintiff should have been aware of the possibility of debris alongside the track and kept a lookout. In the case at bar, the evidence could easily be construed that there was not any other person or outside agency that caused the accident other than the plaintiff himself.

The trial judge predicated his ruling in the case at bar on the appellate court decision in *Uhrhan*, which the supreme court then reversed. (*Uhrhan*, 155 Ill. 2d 537, 617 N.E.2d 1182.) Plaintiff, in this appeal, shifted his reliance to this court's opinion in *O'Ryan v. CSX Transportation, Inc.* (1993), 255 Ill. App. 3d 214, 626 N.E. 2d 374. No attention was paid to the ranting and raving contained in the dissent. The supreme court, however, did not reverse this court's decision in *O'Ryan*. It *vacated* the opinion of this court without comment pursuant to its supervisory authority. (*O'Ryan v. CSX Transportation, Inc.* (1994), 155 Ill. 2d 565, 630 N.E.2d 443.) I do not claim to be a genius, but I believe that the supreme court was sending this court a message. Simply put, courts should quit devising ways that remove the issue of con-

tributory negligence from consideration by a jury. (It would be interesting to see what a jury would do in this case with the contributory negligence issue. Would the jury find the railroad negligent based on plaintiff's acts or omissions and then find plaintiff only 25% contributorily negligent, or would the jury find plaintiff 100% contributorily negligent?)

There does not seem to be a dispute that the trial court erred in allowing evidence and giving instructions late in the trial as to a new theory concerning irrelevant OSHA violations. Surely we should reverse on those grounds alone.

The admission into evidence, by plaintiff, of defendant's surveillance videotapes of plaintiff raises an interesting issue that, most likely, will increasingly confront the courts. Plaintiff obviously wished to prejudice the jury against defendant's "spying," and apparently plaintiff was successful when one looks at the jury's veridct that awarded plaintiff, injured when he was 34, more than twice the expected lifetime earnings for a better job than he held, for a disease that many people possess and overcome, for an injury that plaintiff would eventually suffer from regardless of all precautions taken, and for an injury that did not require surgery and did not prevent him from being retrained for and procuring a less strenuous job. Should the courts or the legislature encourage surveillance to weed out malingering plaintiffs, or should the courts discourage surveillance by allowing plaintiffs to use the videotapes merely to show that defendants "spied" on plaintiffs?

At least three courts have ruled against plaintiffs on the issue of using defendants' surveillance against defendants. (See *Hall v. InPhoto Surveillance Co.* (4th Dist. April 13, 1995), No. 4-94-0864, slip op.; *DiMichel v. South Buffalo Ry. Co.* (1992), 80 N.Y.2d 184, 604 N.E.2d 63; *Scaggs v. Consolidated Rail Corp.* (7th Cir. 1993), 6 F.3d

1290.) Whether courts should or should not encourage surveillance by defendants is a public policy question that should only be decided by the legislature or the supreme court. Appellate and trial courts should confine themselves to only answering the issue of whether the evidence was relevant.

The problem in this case is that plaintiff did not introduce the videotapes for the purpose of showing a day in his life; rather, the primary purpose of plaintiff was to poison the jury against defendant for "spying" on plaintiff. If the videotape had shown plaintiff to be suffering from his injuries, I would have no problem with its admission by plaintiff. Likewise, if the film had shown plaintiff playing golf or leaping into his convertible, I would have no problem with an offer by defendant. Both offers by the parties would be relevant to prove or disprove plaintiff's injuries. In the case at bar, it was doubtful, however, that the videotapes exhibited either plaintiff's injuries or the lack thereof. Moreover, whether or not defendant "spied" did not prove or disprove plaintiff's injury or the extent thereof. The issue of "spying," even if the videotapes were relevant, should have been kept out of the trial until we have some direction by the legislature or the supreme court as to public policy.

Finally, I do not believe that it is fair for either plaintiff or defendant to change the theories contained in the pleadings, either on the day of or during the trial. (If defendant had been allowed to add an affirmative defense during the trial citing mandatory compliance with a statute as authority, we would have reversed in a summary order.) This is especially true when the party raises Federal statutes. This court has witnessed an increasing number of cases where counsel at the last minute raises a Federal statute and a new theory and talks the trial judge into giving incomplete instructions as to that statute to the jury, and we later discover that the statute does not even apply. In this case there were OSHA regulations

(29 U.S.C. sec. 651 *et seq.* (1985)) and the Locomotive Inspection Act (45 U.S.C. sec. 23 (1986)), both of which did not apply. We should not be rewarding the offending party, because all we are doing is encouraging both plaintiffs and defendants to wait until the last minute to spring a surprise on their opponents. The courts should demand and require that the parties define the issues before trial; otherwise, let us stop deluding ourselves that the courts wish to remove surprise as an element from the trial.

Accordingly, I would reverse, as there was very little about this trial that was fair.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Illinois 82706
(217) 782-3635

October 4, 1995

Mr. Thomas M. Alvey, Jr.
Thompson & Mitchell
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Belleville, IL 62222

No. 79251—John Luther, respondent, v. Norfolk and Western Railway Company, etc., petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 26, 1995.

APPENDIX C

[Filed Nov. 5, 1992]

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 90 L 1354

JOHN D. LUTHER,
Plaintiff,

v.

NORFOLK AND WESTERN RAILROAD COMPANY,
Defendant.

ORDER

At the completion of the jury's deliberations the following verdict was read in open court: "We, the jury, find for John Luther on John Luther's complaint and against the Norfolk and Western Railway Company. We further find the following: First: Without taking into consideration the question of reduction of damages due to his failure to mitigate damages, we find that the total amount of damages suffered by the Plaintiff as a proximate result of the occurrence in question is $1,850,000.00. Second: Assuming that 100% represents the total negligence of the Defendant, we find that the percentage of Plaintiff's damages due to his failure to mitigate is 15 percent %. Third: After reducing the total damages sustained by the Plaintiff by the percentage attributable to John Luther's failure to mitigate damages, we assess the Plaintiff's recoverable damages in the sum of $1,572,500.00."

The Court at this time enters Judgment upon the jury's verdict. The Court enters Judgment for the Plaintiff John Luther and against the Defendant Norfolk and Western Railway Company in the amount of one million five hundred seventy-two thousand five hundred dollars ($1,572,500.00) and costs of suit.

Clerk to send copy of this Order to attorneys of record.

Date: November 5, 1992

/s/ George J. Moran
GEORGE MORAN, JR.
Circuit Judge

APPENDIX D

[Filed Jul. 8, 1993]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 90-L-1354

JOHN D. LUTHER,

Plaintiff,

v.

NORFOLK AND WESTERN RAILROAD COMPANY,
a corporation,

Defendant.

ORDER

This action comes on to be heard on the Post Trial Motion of defendant for judgment notwithstanding the verdict of the jury to set aside the verdict and judgment and grant defendant a new trial. The parties being represented by their respective attorneys, and the Court having considered the Motion and arguments of counsel, and being fully advised in the premises, it appears to the Court that the Motion is without merit.

THEREFORE, IT IS HEREBY ORDERED that defendant's Post Trial Motion is denied.

SO ORDERED.

ENTER: July 8, 1993

/s/ George J. Moran, Jr.
Judge

(2)

Supreme Court, U.S.
FILED
FEB 9 1996
CLERK

No. 95-1068

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

JOHN D. LUTHER,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

REPLY BRIEF OF PETITIONER

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February 9, 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

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NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

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Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

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REPLY BRIEF OF PETITIONER

---

1. Contrary to respondent's characterization of the issue in this case, Opp. at 4, 7, there is a starkly defined and judicially acknowledged split among the lower courts as to the threshold showing that a defendant in a case brought under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, must present in order to have the question of a plaintiff's contributory negligence submitted to a jury. While respondent contends that "Plaintiff is only chargeable with his/her own conduct," Opp. at 7, this case demonstrates that in jurisdictions where a defendant's evidence must overcome a greater burden than plaintiff's evidence before it may be considered by a jury, a plaintiff may *not* be held accountable for his or her own conduct. Precisely because the application of different standards in different courts produces the inequitable consequence that in some jurisdictions a plain-

tiff may not be held accountable for his own actions, this Court should grant the petition and consider this case on the merits.

Further, contrary to respondent's assertion, Opp. at 3, the facts in this case provide a striking illustration of the inequity of requiring defendants to meet a higher threshold of proof than plaintiffs in order to raise a jury question concerning negligence. Indeed, Justice Stevens has already found in staying the mandate of the court below, Order (Jan. 10, 1996), that there is at least a "significant possibility" that if the Court grants certiorari the judgment below will be reversed. See, *e.g.*, *Edwards* v. *Hope Medical Group for Women*, 115 S. Ct. 1 (1994) (Scalia, J., in chambers) (discussing standard for granting stay); *CBS, Inc.* v. *Davis*, 114 S. Ct. 912 (1994) (Blackmun, J., in chambers) (same).

As the dissenting justice in the court below observed, "[I]f you exclude plaintiff's acts as the cause of the accident, there is not anyone else or any other agency that we can point the finger at as the cause of plaintiff's injury." Pet. App. at 17a (Lewis, J., dissenting). Nevertheless, it is petitioner who has been held liable to respondent for $1.5 million. Because the facts demonstrate so starkly that requiring a defendant in a FELA case to make a greater prima facie showing than a plaintiff may have the absurd result of preventing a plaintiff from being held accountable for his own acts, this case is particularly well suited for consideration by this Court.

2. The central question in this case is whether a court errs when it requires a defendant, in order to overcome a directed verdict motion, to demonstrate that a plaintiff's actions were not simply unreasonable, but that they tended to "add new dangers" to existing conditions, while requiring a plaintiff to show only ordinary negligence on a defendant's part. Contrary to respondent's contention, Opp. at 4, 7, not only is there a clear split among the

federal circuit courts on this issue, it is a split that is openly acknowledged. For instance, in *Fashauer* v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269 (3d Cir. 1995), the Third Circuit explicitly distinguished its approach to contributory negligence from the approach adopted by the Eighth Circuit in *Birchem* v. *Burlington N.R.R.*, 812 F.2d 1047, 1048-49 (8th Cir. 1987), stating, "We are not persuaded by the *Birchem* court's analysis." *Fashauer*, 57 F.3d at 1279.

Birchem and *Fashauer* consciously represent two distinct legal approaches to contributory negligence. The *Birchem* court (like the courts below in the instant case) followed the approach articulated by the Ninth Circuit, which requires a defendant to demonstrate not simply that a plaintiff had acted unreasonably in performing his job, but that he had "add[ed] new dangers" to existing conditions. 812 F.2d at 1049 (quoting *Taylor* v. *Burlington N.R.R.*, 787 F.2d 1309, 1316 (9th Cir. 1986)); see also Pet. at 8, 11 (citing cases). Even though the plaintiff knew that the "mudjack'" he was using to lift sections of railroad track was defective and that use of defective equipment was a violation of company safety rules, the district court found, and the Eighth Circuit affirmed, that the plaintiff had not added any new dangers to the existing circumstances. Therefore, the question of whether the *Birchem* plaintiff had exercised ordinary care was withheld from the jury. Under the standard used in the Eighth Circuit, the defendant's evidence showed merely that the plaintiff had assumed a risk, a defense that is not allowed under the FELA. *Birchem*, 812 F.2d at 1049.

The Third Circuit rejected the Eighth Circuit's approach as taking too "expansive" a view of the impermissible defense of assumption of the risk, *Fashauer*, 57 F.3d at 1279, and, conversely, too narrow a view of the permissible defense of contributory negligence. The Third Circuit's view of assumption of the risk encompasses only evidence that demonstrates that an employee "implicitly

consented to the risk by accepting employment with the railroad or by performing a task in the manner which the employer directed." *Id.* at 1280. A jury should not be permitted to consider this type of evidence in a FELA case. However, as to all other actions of a plaintiff, "if they are evidence of negligence they should be admitted to show contributory negligence." *Id.* Thus, a jury may consider evidence that a plaintiff "fail[ed] to act prudently in performing the task." *Id.* In the Third Circuit, but not in the Eighth Circuit and, as this case illustrates, not in the Illinois state courts, evidence that a plaintiff failed to exercise "reasonable alternatives available to him," *id.* at 1279, may be adduced to demonstrate contributory negligence.

A third standard, applied in the Fifth and Sixth Circuits, holds both plaintiff and defendant to the same threshold inquiry in order to reach a jury: whether there is any evidence, however slight, to demonstrate that the other party failed to exercise ordinary care. *E.g., Tipton* v. *CSX Transp., Inc.*, No. 91-3333, 1992 WL 43540 (6th Cir. Mar. 9, 1992) (unpublished op.); *Page* v. *St. Louis Southwestern Ry.*, 349 F.2d 820, 822-23 (5th Cir. 1965); see also Pet. at 8 (citing state cases applying "ordinary reasonableness" standard). While the Third Circuit approach permits a jury to consider evidence that a plaintiff acted unreasonably, it first inquires whether the evidence demonstrates only that the plaintiff was "performing a task in the manner which the employer directed." *Fashauer*, 57 F.3d at 1280. If the employee was following the employer's specific instruction, the jury may not consider the reasonableness of the employee's actions.[1] The ap-

[1] Respondent alleges that he performed his tasks "specifically as directed by his foreman." Opp. at 3. However, he does not claim (and indeed cannot claim) that respondent's foreman specifically instructed him *not* to clean the truck bed or *not* to clear a path before replacing the saw. Respondent cites only the *absence* of a specific instruction—that the foreman "did not order the Respond-

proach in the Fifth and Sixth Circuits does not impose this additional barrier to jury consideration of evidence that an employee acted unreasonably.

In *Tipton*, where an employee alleged injury from hauling trash bins to a dumpster, there is no indication that the court inquired into whether the employee was acting pursuant to a specific employer instruction, and the Sixth Circuit upheld an instruction that the jury consider whether the employee had exercised "ordinary care to avoid injury." 1992 WL 43540, at **2; see also *Page*, 349 F.2d at 823 ("So far as negligence is concerned, that standard is the same—ordinary prudence—for both Employee and Railroad alike."); *Hval* v. *Southern Pac. Transp. Co.*, 592 P.2d 1046, 1048 (Or. Ct. App. 1979); *cf. Ganotis* v. *New York Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965) (per curiam) (same standard of proximate causation for employee and railroad).

3. Currently, the jurisdiction in which a case is heard, and thus the threshold inquiry applied to a defendant's evidence, may determine whether a jury is permitted to consider how a plaintiff's own failure to exercise ordinary care has contributed to his injury. While respondent asserts that the "tendency to add new dangers" standard, which was applied to petitioner's evidence in this case, "does not relieve a Plaintiff from the duty to exercise reasonable care for his/her own safety," Opp. at 7, the decision below demonstrates the fallacy of this proposition. In those jurisdictions in which a defendant must demonstrate that a plaintiff's acts were not merely unreasonable but actually added new dangers to the existing situation,

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ent to clean the truck bed." *Id.* Respondent cannot manufacture from the absence of an instruction an affirmative direction not to take certain safety precautions before replacing the saw. Respondent decided on his own how to perform the task of replacing the saw. Therefore, even under the Third Circuit's approach, a jury would have been allowed to consider evidence of respondent's failure to exercise reasonable alternatives in performing that task.

a plaintiff *is* relieved of his duty to exercise reasonable care for his own safety.

The inequitable consequences flowing from a court's imposition of a greater burden on defendant's evidence than on plaintiff's evidence are particularly marked here where, as Justice Lewis found in dissent, respondent probably was the *sole* cause of his own injury. Pet. App. at 17a. Justice Lewis enumerated reasonable measures that respondent might have taken to ensure safe placement of the saw on the truck bed without doing any injury to himself. *Id.* at 16a-17a. He might have cleared a path to an empty spot; he might have put the saw down temporarily, moved closer to the empty spot and then placed the saw there; or he might have located a safe place for the saw before accepting it from the foreman. *Id.* However, because the trial court found that the evidence did not show that respondent actually added new dangers to his situation, the court prevented the jury from considering whether respondent's failure to exercise any of the reasonable alternatives available to him contributed to his injury.[2]

4. Requiring the question of plaintiff's negligence to overcome a greater burden than the question of defendant's negligence in order to reach a jury is contrary to Congress's intent to base "determinations of employer-employee responsibilities" on "equitable principles." *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 65 (1943). The issue in *Tiller* was whether any aspect of the common law

[2] Respondent argues, Opp. at 2-4, at some length that he did not act negligently, but Justice Lewis's opinion reveals plainly that the only basis for removing the issue of respondent's negligence from the jury was the higher legal standard adopted by the majority below. There was certainly a basis in the evidence for the jury to have concluded that respondent acted imprudently and that his actions contributed to his injury. To be sure, the jury might have concluded that respondent acted reasonably under all of the circumstances, but that issue is still a factual one and should have been submitted to the jury.

defense of assumption of the risk had survived the 1939 amendment to the FELA. In concluding that no aspect of assumption of the risk had survived, the Court noted the intent behind the amendment, as expressed in the Report of the Senate Judiciary Committee:

> [to] establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned.

Id. (quoting S. Rep. No. 661, 76th Cong., 1st Sess. 4 (1939)). Nothing in *Tiller* suggests that Congress intended not only to eliminate a major barrier to employees' claims but also to impose a new barrier to employers' defenses. Yet a judge's inquiry into whether an employer's evidence demonstrates that an employee "added new dangers," as in this and other cases, see Pet. at 11 (citing cases), makes reaching the jury substantially harder for an employer than for an employee.

In *Rogers* v. *Missouri Pacific R.R.*, 352 U.S. 500 (1957), this Court emphasized that the threshold showing of an employer's negligence necessary to reach a jury in a FELA case is very low. *Id.* at 506-10. The question for the trial court is simply whether there is any evidence "that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506; see also W. Page Keeton, *et al., Prosser & Keeton on Torts* § 80 at 578-79 (5th ed. 1984) (observing that evidence of negligence that must be shown in FELA case is lower than what must be shown in ordinary tort case).

Consistent with the congressional intent to place employer and employee on a level playing field in FELA cases, there is no support for requiring a defendant to make a greater showing of plaintiff's negligence than plaintiff is required to make of defendant's negligence in

order to reach a jury. Just as a showing of "even the slightest" employer negligence will support jury consideration of plaintiff's case, *Rogers,* 352 U.S. at 506, so "equitable principles," *Tiller,* 318 U.S. at 65, require that a showing of "even the slightest" employee negligence support submitting the defendant's case to the jury. See *Dixon* v. *Penn Cent. Co.,* 481 F.2d 833, 835 (6th Cir. 1973) ("FELA cases that allow plaintiffs to reach the jury on a very slim showing of negligence permit defendants to go to the jury on the issue of plaintiff's negligence with equally slim showings."); *Higgins* v. *CSX Transp., Inc.,* 455 S.E.2d 129, 131 (Ga. Ct. App. 1995); *Hickox* v. *Seaboard Sys. R.R.,* 358 S.E.2d 889, 891 (Ga. Ct. App. 1987); *Prosser & Keeton on Torts* § 65 at 453 ("[C]ontributory negligence, in general, is determined and governed by the same tests and rules as the negligence of the defendant."). However, by requiring a defendant to show that a plaintiff's acts "added new dangers" in order to reach the jury, a court, as in this case, raises the threshold considerably above the very low barrier established in *Rogers.*

* * * *

In *Rogers,* this Court took note of "its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the [FELA] and to prevent its erosion by narrow and niggardly construction." 352 U.S. at 509. In view of the "equitable principles" governing employer and employee responsibilities under FELA, *Tiller,* 318 U.S. at 65, this obligation should apply when administration of the Act prejudices employers, as in this case, as well as when it prejudices employees.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 9, 1996

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Supreme Court, U.S.
FILED
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No. 95-1068

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

JOHN D. LUTHER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Based upon the facts presented, did the Petitioner offer sufficient evidence to present a jury question as to contributory negligence?

2. In distinguishing contributory negligence from assumption of risk in a FELA case, is contributory negligence properly defined as a careless act or omission on the Plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist?

LIST OF ALL PARTIES & RULE 29.1 LIST

The only parties to this proceeding are the:

Petitioner: Norfolk & Western Railway Company

Respondent: John D. Luther

The Petitioner Norfolk & Western Railway Company is a subsidiary of the Norfolk Southern Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1068

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

JOHN D. LUTHER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

REASONS FOR DENYING THE PETITION

I. THE FACTS WERE MISSTATED BY THE PETITIONER

As with every FELA case, they are fact specific and the application of the law to those facts are entirely dependent upon such evidence. Here, the Respondent respectfully submits that the railroad has misstated the facts in an attempt to elevate this case to one of national importance. The facts here simply do not warrant the Court accepting the petition for certiorari. The Petitioner railroad contends that the trial court applied an improper standard for contributory negligence in directing a verdict against it, which verdict was affirmed in the state appellate courts.

The Respondent, John D. Luther, was working as a laborer for the Petitioner and he was injured while placing a heavy rail saw into the back of a work truck. The crew was short handed at the time. Normally 3-5 laborers are assigned to a crew performing track work to replace defective and damaged rail. On the day in question, the Respondent was the only laborer. Furthermore, the crew was working under so-called "track time" which means that the crew had a certain amount of time to complete the work on the track so that its work would not interfere with any train movements. Both of those factors created by the railroad made it impossible to also clean the truck prior to the end of the work day (Trial. Tr.302-305, 323, 353, 371, 383).[1]

In the process of removing defective rail from the tracks, the pieces are cut into 10 foot sections and then placed in the back of the truck, along with other tools and materials that the crew is using. As the particular crew in question was in the process of moving to a second job site, the Respondent climbed into the back of the truck bed and was handed the saw that was used to cut the rail. He testified that he was standing in the back of the truck and looked for a safe place to lay the saw down, and observed a clear space near the box where the rail saw is normally stored. That storage box was located in the front of the truck bed immediately behind the cab. The Respondent stated that he could not go directly to the box because of 8-10 pieces of rail which were located in the back of the truck and other materials which blocked his path. Each piece of rail weighs between 110-132 pounds. He further testified he could not place the rail saw on top of the piece of old rail and other materials because the blades of the rail saw could easily chip, creating a safety hazard. Also, it would have been a violation of company

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[1] "Trial Tr." refers to the transcript of the trial in the lower court.

rules to place a rail saw on top of debris. Respondent observed a cleared space in the truck and walked to that point with his knees bent and reached out to place the saw in the space. As he reached out to place the saw down, he fell to his knees dropping the saw and he felt a sharp pain in the middle of his back (Pet. App. 3a).

At trial, and in the appellate courts, the railroad contended that it had established sufficient evidence of the Respondent's knowledge of the dangerous condition and of his fault in creating an unsafe condition by failing to clean the truck bed. The railroad states that the Respondent acted negligently and that the jury could disbelieve the Respondent's testimony, and infer that, based merely on the fact the accident occurred, Respondent failed to exercise due care. The Petitioner argues that the Respondent was aware of, created, or contributed to the conditions which resulted in his injury. Furthermore, it says that he should have taken simple and reasonable precautions to avoid the dangerous condition (Pet. Br. 5).

However, the facts in this case overwhelmingly demonstrate that there was absolutely no basis for submitting the issue of contributory negligence to a jury. There was no evidence of any rule violation by the Respondent. He performed his work specifically as directed by his foreman, and in the normal and accepted manner. Regarding the Petitioner's position that Mr. Luther should have cleaned the truck bed before attempting to place the saw down, that is contrary to the evidence. A laborer's job is to perform work as he/she is instructed by the foreman of the crew (Trial Tr.310). The Respondent's foreman testified that the Respondent was working under the foreman's instructions, and that he did not order the Respondent to clean the truck bed and had no intention of having anyone clean the truck bed throughout the day, prior to the completion of the entire job (Trial Tr.358). Furthermore, the crew was short handed, and had to complete all

of the work during the allotted track time, and it was not possible to continuously keep the truck bed cleaned or to have a laborer spend time cleaning it. (Trial Tr.302-305, 323, 353, 371, 383). Only where there is a full complement of laborers, one laborer is sometimes placed on the truck to keep it clean throughout the day. (Trial Tr.302-305, 383).

II. THERE IS NO REAL CONFLICT IN THE CIRCUITS

The very narrow issue presented here by the Petitioner is whether or not a contributory negligence instruction should have been given based on the facts adduced at trial. Petitioner's attempt to assert a conflict within the courts is not even reached here, because no contributory negligence instruction was appropriate, irrespective of what the proper standard might be. Furthermore, the undersigned has been unable to find any case which suggests that there is a split in the courts as to the standard to follow regarding contributory negligence in FELA cases. As noted in *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 60-63 (1943), there are various facets to the assumption of risk doctrine, one being the overlap between assumption of risk and contributory negligence. That is the aspect faced in the present case.

A frequently cited opinion by Justice Kennedy when he was a member of the Ninth Circuit, sets out in proper perspective what this petition is all about. See *Taylor v. Burlington Northern Railroad Company*, 787 F.2d 1309, 1316 (9th Cir. 1986). While the facts in that case are not similar to the case at bar, the legal principles are the same. That court noted that there is some overlap between assumption of risk and contributory negligence, but generally the two defenses are not interchangeable. It defined assumption of risk at common law as an employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties. Contributory negligence, in contrast, was defined as a careless act

or omission on the Plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist. This was similarly expressed earlier by Professor Bohlen in *Contributory Negligence,* 21 Harv. L. Rev. 233, 249 (1908):

> Voluntary assumption of risk is the mere passive subjection by the Plaintiff of himself to the risk of injury inherent in known defective conditions. Contributory negligence is an act or omission on the plaintiff's part tending to a reasonable probability *to add new danger's* to his situation, not necessarily incident to the known defective conditions, and bringing upon himself a harm not caused solely by them, but created in part at least by his own misconduct. (Emphasis added)

Stated another way, contributory negligence implies a careless act or omission on the part of the servant *superimposed* upon the mere necessary acceptance of known conditions negligently created or permitted to exist by employer. *Mumma v. Reading Co.,* 247 F.Supp. 252, 256-257 (E.D. Pa. 1965). In *Paul v. Missouri Pacific R.R.,* 963 F.2d 1058, 1060 (8th Cir. 1992) the court noted that the *tending to add new dangers* in the definition of contributory negligence *captures the necessary elements when the negligence of the defendant and the negligence of the plaintiff combine to create a single situation from which a sudden and indivisible injury arise.* Whether or not the employee acted reasonably in increasing the dangers which already existed, because of the railroad's negligence, is nothing more than another way of expressing contributory negligence. Also, it better puts into focus the situation that arguably could be considered assumption of risk, but also may be contributory negligence.

The *Taylor* court pointed out that defenses once embraced substantially within the concept of the assumption of risk are barred under FELA and may not be revised in the form of contributory negligence, and where an act

of alleged contributory negligence is the practical counterpart of assumption of risk, it does not constitute a defense. 787 F.2d at 1316, citing *Tiller* 319 U.S. at 58. This Court in *Tiller* warned that " 'unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumptions of the risk under another name;' " *Id.*

As in *Taylor*, the case at bar presents in essence an assumption of risk defense, and not one based on contributory negligence. The Respondent was performing a routine assignment in compliance with instructions from his supervisor. It is well established that contributory negligence may not be submitted to a jury where the employee merely acceded to the request or direction of his supervisor. See *Louis v. Timco Inc.*, 736 F.2d 163, 167 (5th Cir. 1984). As in *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 257 (2d Cir. 1973), the Petitioner's theory here is really an assumption of risk masquerading under another name—contributory negligence. The railroad must meet its affirmative burden that there is some evidence of negligence by the employee, before any instruction on contributory negligence should be given. The Respondent submits that, based upon the facts of this case, the Petitioner woefully failed to meet its burden. The only argument presented at trial by the Petitioner as to the Respondent's possible contributory negligence was that he failed to clean the truck bed before putting the rail saw down. As noted previously, the Respondent's foreman testified that the Respondent was working under the foreman's instruction, and that he did not order the Respondent to clean the truck bed and had no intention of having anyone clean the truck bed throughout the day prior to the completion of the entire job (Trial Tr.358). Moreover, no safety rules of the railroad were violated by the Respondent.

The position of the railroad in the lower courts was that a jury could have disbelieved the Respondent and

inferred that since the accident occurred, he failed to exercise due care. This simply does not raise to the level of contributory negligence, despite what the Petitioner asserts in this Court. A contributory negligence instruction is inappropriate where the railroad's allegation is nothing more than the incredibility of the Plaintiff's testimony. See *Borough v. Duluth, Missabe & Iron Range Ry. Co.*, 762 F.2d 66, 69 (8th Cir. 1985); *Dixon v. Penn Central Co.*, 481 F.2d 833, 837 (6th Cir. 1973).

The Petitioner states that the contributory negligence standard used in the trial court was improper because the railroad had to establish a careless act or omission on the Respondent's part tending to add new dangers to the conditions that were created by the railroad. This standard is just another way of stating that the railroad must offer some proof of negligence other than what it created itself. A Plaintiff in a FELA case is not chargeable with any negligent conduct of his/her employer. Rather, Plaintiff is only chargeable with his/her own conduct. Therefore, the jury may consider only what the Plaintiff did, or failed to do, at the time and place in question, which is necessarily a requirement that new dangers had to be added by the Plaintiff to the conditions that were already created by the railroad. That does not relieve a Plaintiff from the duty to exercise reasonable care for his/her own safety.

The Petition is a poorly veiled attempt to show a conflict in the circuits where none really exists. The alleged split arises because Petitioner obfuscates the distinction between certain aspects of assumption of risk and contributory negligence. Depending upon the specific facts of a case, the railroad must establish that the employee added other dangers to an already dangerous condition which it created before there can be contributory negligence. This is both logical and sound law, because the railroad must show that the employee added to a danger apart from that created by the railroad.

The cases cited by Petitioner to support its argument that a split in the circuits exists are distinguishable on the facts. Each one presents situations that would normally embrace assumption of risk, but alleged added unreasonable acts of the Plaintiff was treated by the railroad as equivalent to contributory negligence. In *Tersiner v. Union Pacific R.R.*, No. 90-3361, 1991 WL 225897 (10th Cir. Oct. 30, 1991), the Plaintiff had been standing on a pallet while in the process of obtaining ice and water and he fell when his shoe slipped through a slot. By standing on the pallet, he violated a company rule, and evidence showed that other workers did not stand on the pallet. In *Gish v. CSX Transportation, Inc.*, 890 F.2d 989 (7th Cir. 1989), the Plaintiff suffered back injuries while attempting to remove a heavy manhole cover. The court found that the Plaintiff used a pry bar when he could have used a carhook or forklift, and he didn't seek assistance. The Seventh Circuit concluded that a jury could reasonably find from the evidence that Plaintiff's actions did add additional dangers to an already dangerous situation. *Id.* at 992. In *Birchem v. Burlington Northern R.R.*, 818 F.2d 1047 (8th Cir. 1987), the Plaintiff was injured while using a defective mudjack.[2] The use of unsafe or defective equipment violated a company rule. There was no evidence that Plaintiff in any way failed to use proper care in operating the machine, and the court held that a contributory negligence instruction would have been improper under those facts, because Plaintiff did not add to the danger. *Id.* at 1049. The facts in the *Taylor* case did not involve an injury resulting from unsafe physical conditions.

The Petitioner argues at p. 11 that the Third Circuit "generally submits the issue of contributory negligence to

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[2] That lawsuit involved two separate accidents but only the mudjack incident is relevant to this decision. A mudjack is a machine used along railroad track which lifts the track with its "jaws".

the jury under a 'reasonably prudent person' standard, but that it still considers the doctrine of assumption of risk, citing *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1280 (3d Cir. 1995). Respondent submits that the Third Circuit's method of distinguishing between assumption of risk and contributory negligence are very similar to the Seventh, Eight, Ninth and Tenth Circuits. All recognize that there needs to be a distinction drawn between contributory negligence and assumption of risk in certain types of FELA cases.

The Fifth and Sixth Circuit cases and the state cases within these Circuits cited by Petitioner to support its position that a split in the circuits exist are not on point. In *Tipton v. CSX Transportation, Inc.*, No. 91-3333, 1992 WL 43540 (6th Cir. March 9, 1992) (unpublished decision), the jury did not reach the issue of contributory negligence because it found that the railroad was not negligent.[3]

The Fifth Circuit case, *Kendrick v. Illinois Central Gulf R.R.*, 669 F.2d 341, 344 (5th Cir. 1982), even recognized that an employee may not recover for injuries occasioned by his own neglect "of some independent duty", citing *Dixon v. U.S.*, 219 F.2d 10 (2d Cir. 1955). This is no different than saying that the employee has to add to the negligence already created by the railroad in order to be contributorily negligent. In the other cited Fifth Circuit case, *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5th Cir. 1965), the court was concerned only with proximate cause, and not the nuances between assumption of risk and contributory negligence.

Finally, even assuming *arguendo* that the standard used by the lower court was in error, it certainly was no more than harmless error, because of the facts established in this

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[3] Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case.

case, no instruction of contributory negligence would have been appropriate.

CONCLUSION

In conclusion, the Respondent submits, that based upon the facts of this case, the issue presented by Petitioner is not worthy of any further consideration by this Court, and the petition should be denied.

Respectfully submitted,

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